

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-221384

DATE: April 30, 1986

MATTER OF: Military Services, Inc. of Georgia

DIGEST:

1. Agency's decision to negotiate a fixed-price contract for overall food service operation at the agency's facility in lieu of requiring sealed bids is justified where the variety of services required justifies holding discussions with responding sources.
2. Solicitation provision that corporate food service experience, and not just individual experience, is a prerequisite for award of a contract for food service operations is not reasonable where the agency has not established that the requirement is necessary to meet the government's needs, and only one firm is known to meet the requirement.

Military Services, Inc. of Georgia (MSG) protests that the contract work in request for proposals (RFP) No. N00600-86-R-1278, issued by the Department of the Navy, should be procured through sealed bidding rather than through negotiation. MSG also protests that a corporate experience requirement in the solicitation unduly restricts competition. The RFP is part of a cost comparison study to determine whether it would be more economical to accomplish the entire food service operation at the United States Naval Academy in-house using government employees, or by contract. We deny the protest in part and sustain it in part.

MSG is the incumbent contractor for mess attendant services at the Academy. These services are limited to serving the food prepared by government cooks from kitchen-loaded carts. The RFP combines mess attendant services with the food preparation services for regular meals and for special events that at present are being performed at the Academy by government personnel. In addition, the RFP calls for other services such as setting tables; maintenance, cleaning, and storage of food preparation

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equipment; cleaning the kitchen area; receipt and storage of food purchased by the government; and transporting food and food-serving equipment throughout the Academy complex in support of planned special events.

Use of Negotiated Procurement

MSG argues that the RFP should be canceled and the requirements resolicited through sealed bidding because the Navy, in MSG's opinion, improperly used the negotiated method of procurement. MSG points out that beginning with our decision in ABC Management Services, Inc., et al., 53 Comp. Gen. 656 (1974), 74-1 C.P.D. ¶ 125, we consistently have held that the use of negotiation instead of formal advertising is not justified in procurements for mess attendant services. MSG argues that in light of the Navy's prior experience in food preparation and contracting for mess attendant services at the Naval Academy, there is no reason why the agency cannot prepare specifications adequately describing the work to be performed and, thus, structure a contract suitable for formal advertising. MSG further argues that the regulations mandate the use of sealed bidding absent a justification for requesting competitive proposals.

The Navy states that procuring the food service requirements through negotiation is justified based on the need for discussions with the responding sources. The Navy emphasizes that the RFP contains a complex performance of work statement of more than 300 pages. According to the Navy, there is a need for discussions concerning a potential source's management staffing plan, the experience of its personnel and, most importantly, the technical approach for meeting the requirements set forth in the performance of work statement. The agency points out that the RFP provides for a range of services, including food preparation, that exceeds the scope of a typical mess attendant contract.

MSG is correct that we generally have rejected arguments that the military's needs in mess attendant services procurements justify the use of negotiation instead of formal advertising. United Food Services, Inc., B-217211, Sept. 24, 1985, 64 Comp. Gen. ___, 85-2 C.P.D. ¶ 326. We have taken the position that bidders can take

the variations in meal requirements and attendance into account when computing their bids and submit fixed-price bids for mess attendant services on the basis of costs of individual meals or hourly rates of services to be provided. See Space Services International Corp., B-207888.4 et al., Dec. 13, 1982, 82-2 C.P.D. ¶ 525. We have taken note of the fact that the military departments routinely have been able to procure mess attendant services through the use of formal advertising. United Food Services, Inc., B-217211, supra.

The food services involved here, however, are not routine mess attendant services. The Navy is expanding the food services at the Academy to include areas other than just providing mess attendant services. In addition to being responsible for the actual preparation of the meals of the Academy, the contractor, as noted above, must furnish kitchen and mess facilities, janitorial services, and maintenance and repair of food preparation equipment services. In short, the contractor will be responsible for all matters associated with the Academy's food service operation except the planning for the kinds of meals to be served each day and the purchase of the food.

The Competition in Contracting Act of 1984 (CICA) eliminates the prior statutory preference for formally advertised procurements (now "sealed bids") and allows the executive agencies to use the competitive procedure, or combination of competitive procedures, that is best suited for the circumstances of the procurement. 10 U.S.C.A. § 2304 (West Supp. 1985). CICA and the Federal Acquisition Regulation, 48 C.F.R. § 6.401 (1984), further provide that sealed bids are not appropriate if discussions with the responding sources are anticipated, even where there is time for sealed bidding and award is intended to be made on the basis of price. Given the variety of the services involved in this procurement compared with prior Academy procurements covering only mess attendant services, we find that the Navy was reasonable in determining that competitive proposals, rather than sealed bids, were appropriate because of the need for discussions with responding sources. Accordingly, we deny MSG's protest on this issue.

Prior Corporate Experience

The RFP requires that an offeror have prior corporate experience preparing and serving at least 3,000 meals per day and further provides that this corporate experience requirement will not be satisfied solely by the offeror

employing an individual or individuals possessing such experience by virtue of their prior employment with some other firm. MSG contends that the corporate experience requirement is unduly restrictive of competition because an offeror could be eliminated for lack of experience even if it assembled an experienced food service team fully capable of performing the contract. MSG takes the position that the corporate experience requirement thus bears no real relation to an offeror's ability to perform satisfactorily, and that the requirement represents an arbitrary means of prequalifying offerors and eliminating otherwise qualified offerors that could obtain competent personnel with individual experience in preparing 3,000 meals per day.

Preliminarily, the Navy contends that MSG's protest on this issue should be dismissed because MSG is a small business, the corporate experience requirement is a definitive responsibility criterion, and the determination of whether an offeror meets the requirement thus would be a responsibility matter reviewable exclusively by the Small Business Administration (SBA) under the certificate of competency procedures.

We agree that the corporate experience requirement is a definitive responsibility criterion. Definitive responsibility criteria are specific and objective standards, established by an agency for a particular procurement, for use in measuring an offeror's ability to perform the contract. The special standards limit the class of offerors to those meeting specified qualitative and quantitative qualifications that the agency determines are necessary for adequate contract performance. Vulcan Engineering Co., B-214595, Oct. 12, 1984, 84-2 C.P.D. ¶ 403. The provision in question here requires that an offeror possess a specific amount of a specific type of experience for the sole purpose of assessing the offeror's ability to perform this contract.

The fact that a small business' failure to satisfy the corporate experience requirement would result in a non-responsibility determination reviewable exclusively by the SBA, however, does not warrant dismissal of this aspect of MSG's protest. MSG's protest does not question the manner in which the requirement will be applied but, rather, involves only whether the requirement should have been included in the RFP in the first place, that is, whether it reflects the actual minimum needs of the government, or unduly restricts competition. Definitive responsibility

criteria that are not reasonably related to an agency's minimum needs should not be applied to determine an offeror's ability to perform, and it is within the purview of our Office to consider whether this is the case. See generally Amray, Inc., B-208308, Jan. 17, 1983, 83-1 C.P.D. ¶ 43.

With regard to the merits of MSG's protest, the Navy states that because of the large-scale feeding operation at the Academy, 3,000 meals per day were set out in the RFP as a minimum corporate experience requirement in order to assure that an offeror would possess the basic level of experience necessary to perform successfully. The Navy explains that corporate, rather than individual, experience was called for because, if the corporation itself has the necessary experience, it can draw on that experience to develop an efficient and effective organization with standardized operations. According to the Navy, standardized operations are essential in running the food service at the Academy on a time-sensitive, quality-conscious basis. The Navy believes that if a corporation like MSG was permitted to hire new managers from different companies in order to satisfy the experience requirement, there would result a conflict in management philosophies, styles, and operating procedures, since the new managers would have little experience with the hiring corporation and likely would not have worked together previously.

In preparing for the procurement of supplies or services, the procuring agency must specify its needs and solicit offers in a manner designed to achieve full and open competition, so that all responsible sources are permitted to compete. 41 U.S.C.A. § 253(a)(1)(A) (West Supp. 1985). A solicitation may include restrictive provisions only to the extent necessary to satisfy the needs of the agency or as otherwise authorized by law. 41 U.S.C.A. § 253(a)(2)(B). Where a solicitation provision is challenged as restrictive, the initial burden is on the procuring agency to establish prima facie support for its belief that the challenged provision is necessary to satisfy its needs. The adequacy of the agency's justification is ascertained through examining whether the agency's explanation is reasonable, that is, whether the explanation can withstand logical scrutiny. R.R. Mongeau Engineers, Inc., B-218356, B-218357, July 8, 1985, 85-2 C.P.D. ¶ 29. Once this prima facie support is established, the burden

shifts to the protester to rebut the agency's position and show that the allegedly restrictive provision is unreasonable. Unico, Inc., B-217255, Aug. 7, 1985, 85-2 C.P.D. ¶ 138.

We find that the Navy has failed to establish prima facie support for the corporate experience requirement. The Navy's justification is comprised of no more than its conclusory statements that it requires an efficient and effective organization with standardized operations and that this could not be achieved without experience at the corporate level, since a conflict in management styles would result if a corporation was to hire new managers from other companies to obtain food preparation experience. The Navy does not undertake to explain why it has concluded, in essence, that it would be impossible for an offeror to assemble an effective management structure absent extensive corporate experience on its own part, and we find no empirical or other support for this proposition in the record. More specifically, the Navy has provided us with no details as to the precise nature of the management expertise needed to supervise the cooks in preparing the food at the Academy; how many managers currently are involved in supervising the food preparation at the Academy; or the precise predicted effect of having a management team assembled strictly for the purpose of performing this contract.

The Navy also has not addressed the possibility that a firm's experience or circumstances, particularly MSG's, may make it possible for the firm to perform here without all of the specific in-house corporate experience in question. While MSG's current contract does not involve food preparation, according to MSG the company's managers, in addition to their direct experience in running the Academy's food service operation the last 5 years, also have individual experience in the food preparation area. As MSG further points out, the RFP requires that the civilian employees at the Academy, both cooks and supervisors, be given the right of first refusal for any contractor employment openings in positions for which these employees are qualified. If MSG is the successful offeror, then, the combined food preparation and food service staff likely will consist largely of the same individuals now performing the operation.

Ignoring the incumbent's and other offerors' particular circumstances in favor of the corporate experience requirement is especially questionable, we think, in view of the fact that only one of three offerors offers

were accepted in the face of MSG's protest) has been found to meet the corporate experience requirement. While the Academy's contract may be more involved than most mess attendant service contracts, there is no reason to assume, based on this record, that no other food service firms would be able to perform satisfactorily. The corporate experience requirement precludes the Navy from identifying other capable firms.

In sum, while we would agree with the Navy that corporate experience in food preparation and service certainly is a factor which could be taken into consideration in the evaluation process, we find that the Navy has failed to establish that an offeror's failure to possess the corporate experience specified is a reasonable basis for concluding that the offeror cannot perform and automatically eliminating the offeror from the competition, at least in light of the fact that the restriction appears to have left only a single eligible firm.

MSG's protest on this issue is sustained. By letter of today to the Secretary, we are recommending that the Navy amend the RFP to eliminate the corporate experience requirement as a prerequisite to receiving the award, and reopen the competition. The Navy should consider either converting the requirement to an evaluation factor or, as was the case in an earlier solicitation for this requirement, permitting offerors to meet the requirement through the presence of individuals possessing such experience, regardless of whether it was obtained with the offeror or with some other organization.^{1/}

The protest is denied in part and sustained in part.


for Comptroller General
of the United States

^{1/} We are aware that on an earlier solicitation for this requirement, the Navy received no technically acceptable offers. The Navy has not indicated that the corporate experience requirement in the current solicitation is necessary to avoid the same result, and it is not apparent to us that this is the case.